IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES PAVATT,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
JEFFREY D. MATTHEWS,	)	
	)	**Case No. CIV-10-141-F**
Intervenor Plaintiff,	)	
	)	
v.	)	
	)	
JUSTIN JONES, ***et al.*****,**	)	
	)	
Defendants.	)	

INTERVENOR PLAINTIFF JEFFREY MATTHEWS' AMENDED MOTION FOR PRELIMINARY INJUNCTION WITH BRIEF IN SUPPORT

Plaintiff Jeffrey D. Matthews, by and through his counsel, requests this Court enter a preliminary injunction/temporary restraining order against the Defendants preventing them from executing Mr. Matthews by lethal injection until further order of the Court. This request for injunctive relief is submitted pursuant to Rule 65 (a) and (b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

1) The Plaintiff, Jeffrey D. Matthews, is a prisoner confined under the supervision of the Oklahoma Department of Corrections [hereinafter, ODOC]. Mr. Matthews's ODOC Prisoner No. is 195154. Mr. Matthews has been sentenced to death by lethal injection; his

execution was originally scheduled for June 17, 2010, and pursuant the Governor's granting of two executive stays was scheduled for August 17, 2010. This Court granted a sixty (60) day stay of execution until October 16, 2010. A future execution date is anticipated absent an extension of the stay and/or the requested injunctive relief being granted. *See* Okla. Stat. tit. 22, § 1001.1.

2) The Defendants are employees of the State of Oklahoma. Currently, Defendant Justin Jones is the Director of ODOC, in Oklahoma City, Oklahoma. The Defendants are charged with carrying out the execution of Mr. Matthews.

3) Mr. Matthews initiated this action by filing a Motion to Intervene in CIV-10-141-F and attaching a proposed complaint on August 17, 2010. Doc. 30. The action was brought pursuant Title 42, United States Code, Section 1983. The Complaint, as filed on September 1, 2010, alleges impending violations of Mr. Matthews's Constitutional rights to be free from cruel and unusual punishment, secured by the Eighth and Fourteenth Amendment to the Constitution of the United States. Mr. Matthews does not challenge the fact of his sentence of death, nor does he challenge the Constitutionality of the Oklahoma statute requiring death by lethal injection.

4) Counsel for Mr. Matthews was informed, on the eve of his execution, that *Brevital* would be substituted for *Sodium Thiopental* in Oklahoma's Lethal Injection Protocol. It is unclear why the State waited so long to tell anyone of this controversial change in the all-important anesthetic to be used in Oklahoma execution, considering: (1)

prior to the original June 17, 2010 execution date, due to a known shortage of *Sodium Thiopental*, counsel for Mr. Matthews inquired of opposing counsel of the availability of the drug and received assurance that the execution would proceed according to protocol; (2) the ODOC learned it had no viable *Sodium Thiopental* in "mid July," (Tr. 08/17/2010 at 8); and (3) there was ample notice of the execution date to all parties.

5) At a September 7, 2010 hearing, the Defendants informed the parties and this Court that, in lieu of *Brevital*, they intended to use 5 grams of *Sodium Thiopental* obtained from the Arkansas Department of Corrections on Mr. Matthews.[1]

6) Subsequently, at a conference held on September 23, 2010, Defendants reversed courses again and stated they now intend to use the recently acquired 5 grams of *Sodium Thiopental* in the execution by lethal injection of Mr. Wackerly. With respect to Mr. Matthews, the Defendants announced their intent to now use *Pentobarbital* in carrying out his execution. *Pentobarbital* may well be unsuitable for use in combination with the neuromuscular blocker and the *Potassium Chloride*.

7) Mr. Matthews is informed of his duty to exhaust administrative remedies, and is currently proceeding to fulfill that duty.

8) Mr. Matthews asserts the Defendants are acting under color of Oklahoma law

[1] At the September 7, 2010 hearing, the Defendants also asserted their intent to use, instead of either *Brevital* or *Sodium Thiopental*, the drug *Pentobarbital* in other potential State executions including that of Donald Wackerly, who was then and still is scheduled for execution on October 14, 2010.

in designing the ODOC protocol for execution by lethal injection. Mr. Matthews asserts the protocol - if an identifiable protocol can be said to exist - as well as the selection and administration of the chemicals, in amounts and combinations determined by the Defendants, either will unnecessarily risk conscious suffering and pain in the execution of the sentence of death, or the Defendants are deliberately indifferent to Mr. Matthews's health, welfare, and safety, or both.

9) Mr. Matthews asserts that Defendants, due to the amorphous nature of their lethal injection protocol, in essence have no actual set of protocols in place. Defendants are currently able, and in fact do, change the protocol only days or hours before an execution, and without notice to the inmate to be executed. This capability and practice does not comport with the intended meaning of a protocol. Not having a protocol creates an undue risk of harm to the individual subjected to an execution.

10) Mr. Matthews further asserts that Defendants fail to comply with their lethal injection protocol, creating a substantial risk of harm to Mr. Matthews. The risks associated with Defendants' failure to comply with their protocol are intertwined with the risks associated with Defendants' use of a new drug, *Pentobarbital*, as the anesthetic in their 3-drug cocktail.

11) Defendants abandoned their execution protocol August 16, 2010, one day before Mr. Matthews' scheduled execution. After asserting various, inconsistent intentions, the Defendants' latest proposed procedure calling for use of *Pentobarbital* is untested,

potentially dangerous, and could well result in a torturous execution for Mr. Matthews.

ARGUMENT AND AUTHORITY SUPPORTING REQUEST FOR INJUNCTIVE RELIEF

I. LEGAL STANDARDS APPLICABLE TO MR. MATTHEWS'S MOTION

12) Consonant with Rule 65, Mr. Matthews is requesting an injunction to preserve the *status quo* until a full trial on the merits of his Complaint can be conducted. Irreparable injury will occur if Defendants are not restrained from proceeding with Mr. Matthews's execution under the hastily redesigned ODOC protocol, or any further redesign, using the chemicals in amounts and combinations devised and administered by Defendants. A preliminary injuction precluding Mr. Matthews's execution is the only remedy available to protect the Constitutional rights secured to Mr. Matthews by the Eighth and Fourteenth Amendments to the United States Constitution.

13) The Tenth Circuit enumerated the prerequisites for the issuance of a preliminary injunction in *Lundgrin v. Claytor,* 619 F.2d 61 (10th Cir. 1980). The Circuit adopted four factors, without an evident intention to announce a hierarchy. *Id.* at 63. While the order and precise language used to describe the four factors has varied through the development of Tenth Circuit case law, the core requirements of the factors remain unchanged in essential purpose.

> A movant is entitled to a preliminary injunction if he can establish the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.

Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001); compare *Dominion Video Satellite v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004).

14) With regard to the relative weight accorded each factor, the Tenth Circuit held since the showing of "'probable irreparable injury is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Dominion Video,* 356 F.3d at 1260, quoting *Reuters Ltd. v. United Press Int'l., Inc.*, 903 F2d 904, 907 (2d Cir. 1990).

15) The movant's demonstration of proof of irreparable injury is balanced against the harm caused to the subject of the injunction and the harm caused by the injunction to the public interest. If the court determines the movant established the balance of harms weighed in his favor, a more lenient standard is applied to the first factor. Rather than being required to show a "substantial likelihood" of success, the movant must prove that there are "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). The movant will be held to the stricter standard and required to demonstrate a "substantial likelihood of success" if he is seeking one of the "disfavored" preliminary injunctions, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 n. 4 (10th Cir. 2001), or is attempting to "stay governmental action taken in the public interest pursuant to a statutory or regulatory

scheme," *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). Mr. Matthews's Motion seeks to maintain the *status quo* until the Court can resolve his claims on the merits. If this Motion is granted, the Defendants will be precluded from executing Mr. Matthews through unconstitutional means and processes. Mr. Matthews has properly invoked the jurisdiction of this Court and is seeking appropriate relief. *Compare Prairie Band of Potawatomi Indians*, 253 F.3d at n. 4 (discussing three types of "disfavored" preliminary injunctions).

16) This Court has expressed concern regarding case law in *Nelson v. Campbell*, 541 U.S. 637 (2004), and *Hill v. McDonough*, 547 U.S. 573 (2006), and the proposition of an equitable presumption against filings for stays in capital cases where the claim could have been brought earlier hereby avoiding the need for a stay. However, as the major issue has changed to Defendants' newly announced plan to use *Pentobarbital* rather than the 5 grams of *Sodium Thiopental* obtained from the State of Arkansas, Mr. Matthews, as was the case when the Defendants suddenly announced their planned use of *Brevital*, could not possibly have filed the claim early enough to avoid the need for a stay. And, as noted previously herein, the risks associated with Defendants' use of a new drug, *Pentobarbital*, as the anesthetic in their 3-drug cocktail are intertwined with the Defendants' failure to have a meaningful protocol and failures to comply with their purported protocol.

II. APPLICATION OF LEGAL STANDARDS TO FACTS

A. Irreparable Injury

17) The Tenth Circuit noted "[t]he concept of irreparable harm unfortunately, 'does not readily lend itself to definition.'" *Prairie Band of Potawatomi Indians,* 253 F.3d at 1250 (internal citation omitted). The Circuit recognized some guidance could be derived from case law. "To constitute irreparable harm, the injury must be certain, great, actual 'and not theoretical.'" *Heideman*, 348 F.3d at 1189 (internal citation omitted). Further, the movant must demonstrate the injury "is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable injury." *Id.*

18) In Mr. Matthews' Complaint, he identified the procedures to be used by the Defendants to carry out his execution. Doc. 54 (9-1-10 cmplt). Given that Defendants have hastily thrown together a new execution cocktail, the probability of Mr. Matthews sustaining an irreparable injury is substantial as he may be tortured to death through use of this new combination which has yet to be tested or be examined adequately by medical experts. Even prior to the latest experimental protocol Defendants intend to use on Mr. Matthews, serious Constitutional questions were raised by the complaint(s) in this litigation that should be adjudicated before Mr. Matthews is executed.

19) Risks associated with the Defendants' proposed use of *Pentobarbital* relate to Defendants' intention to use the drug not alone, but as part of a 3-drug cocktail. Perhaps most notably, *Pentobarbital* is a slower acting barbiturate than Sodium Thiopental and thus requires a greater duration of time to achieve the requisite plane of anesthesia. This increases the risk of the subject, here Mr. Matthews, not being fully anaesthetized at the time of

administration of the *Vecuronium Bromide* and *Potassium Chloride*, thereby increasing the risk of suffering excruciating pain. Given the changes in positions and short notice provided by the State, Mr. Matthews has only begun to investigate fully the dangers of using *Pentobarbital* as part of a 3-drug cocktail. However, counsel believes *Pentobarbital* is untested as a drug used in this context. Its use as part of a three-drug cocktail in the execution of Mr. Matthews is experimental and creates a grave and substantial risk of harm.

20) These risks are exacerbated by the Defendants' ability and propensity to change the proposed protocol instantly and by their failures to follow the so-called protocol in any event.

21) The Defendants' proposed use of a new, and untested drug for a procedure recognized by the medical profession to require a high degree of skill and training, coupled with the Defendants' documented failures, establish there is an imminent, identifiable, and substantial risk Mr. Matthews will experience conscious suffering and pain incident to and during the execution of his sentence of death beyond what is attendant to the act of dying by lethal injection. Irreparable harm warranting injunctive relief is established in this case.

22) Defendants use of *Pentobarbital* also clearly violates Oklahoma's death penalty statute. 22 Okl.St.Ann. Section 1014. The statute requires use of an "ultra-short acting" barbiturate. *Id.* *Pentobarbital* is not an "ultra-short acting" barbiturate. Violation of Mr. Matthews' state-created right to be executed in the manner set forth by state law deprives Mr. Matthews of his fundamental right of due process under the Fourteenth Amendment. *See*

Hicks v. Oklahoma, 447 U.S. 343, 346-347 (1980).

B. The "Balance of Harms:" The Threatened Injury to Mr. Matthews Outweighs Any Arguable Injury to Defendants.

23) In determining the "balance of harms," the Court must consider the nature of the irreparable injury the movant has demonstrated in light of the injury that would likely result if the actions of the defendant were restrained. Applying this factor, courts have held in favor of movants who demonstrated damage, which could not be ameliorated through conventional methods and could be avoided at less significant consequence to the defendant. E.g., *Tri-State Generation and Transmission Association v. Shoshone River Power, Inc.*, 805 F.2d 352, 357 (10th Cir. 1986) ("Balanced against the possible dire consequences to Tri-State's existence, any injury incurred by Shoshone or Pacific from mere postponement of the sale is neither exceptional nor uncompensable with a money award."); *Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639, 652 (10th Cir. 2004) (although injury was economic, gas retailer's interest merited injunction compelling competitor to desist in violating State law); *Kansas Hospital Association v. Whiteman*, 835 F. Supp. 1548, 1553 (D. Kan. 1993) (hospitals successfully enjoined State official from implementing an increase in Medicaid co-payments for outpatient services; State's interest in collecting additional revenue did not outweigh significant financial burden to corporations). *Heideman* illustrates the converse principle. The plaintiffs, who were employed as exotic dancers, claimed their First Amendment right to free expression would be irreparably infringed if South Salt Lake City, Utah enforced a ban on totally nude dancing. The Circuit noted, "The only question, then,

is whether the requirement that they [the plaintiffs] wear pasties and G-strings in the meantime [while the merits of the suit were determined] is sufficient injury to warrant relief." *Heideman*, 348 F.3d at 1189.

24) In this case, a preliminary injunction would not preclude the Defendants from executing Mr. Matthews by lethal injection; it would have the immediate effect of preventing the Defendants from carrying out the execution of Mr. Matthews based on a rash decision to substitute *Pentobarbital* as the anesthetic. Given the current posture of this litigation, resolution of the merits will extend beyond the current sixty (60) day stay. Further, the Defendants have conceded the current unavailability of *Sodium Thiopental* is expected to extend beyond November, and Mr. Matthews expects the evidence to show the sole supplier will not be in a position to ship thiopental until next Spring. A preliminary injunction would preclude the Defendants from proceeding with the execution of Mr. Matthews under a hastily assembled and thiopental-free protocol. A delay for purposes of ensuring Mr. Matthews's Eighth and Fourteenth Amendment Constitutional rights are not violated would neither materially disadvantage nor injure the Defendants. Conversely, allowing the execution of Mr. Matthews to proceed presents a grave risk to Mr. Matthews' Constitutional rights to be free from cruel and unusual punishment as well as the arbitrary and capricious actions of the Defendants in the execution of his sentence of death. Mr. Matthews' substantial risk of irreparable injury patently outweighs any arguable inconvenience, delay, or amendment of process the Defendants might experience.

C. The Injunction Is Not Adverse to the Public Interest

25) In determining the impact of an injunction on the public interest, courts have considered both the nature of the public interest implicated in the litigation and the ultimate purpose of the suit. *See Prairie Band of Potawatomie Indians*, 253 F.3d at 1253 (State's interest in having tribal tagged automobiles in national database, characterized as a safety issue, balanced against tribal sovereignty; ". . . the safety issue is not as portentous as the defendants [State officials] would have it; in addition, this court's case law suggests that tribal self-governance may be a matter of public interest."); *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1201 (10th Cir. 1992) (preliminary injunction granted; public interest served by preserving assets that "may provide restitution to the depository insurance fund for monies fraudulently taken" by defendants); *Kansas Hospital Association*, 835 F. Supp. at 1553 (budgetary savings is in pubic interest of State and Federal taxpayers, but "that interest must give way if it is in conflict with federal substantive law."). In weighing this factor, the Court may consider broader public interests, as well as those of the public most immediately impacted by the litigation. *Tri-State Generation*, 805 F.2d at 357.

26) The public's interest in the timely administration of criminal justice processes must be balanced against the public's interest in the Constitutional administration of all criminal justice sentences, including sentences of death.

27) Death by lethal injection was proposed and adopted as a humane method of enforcing the death penalty. With the Defendants' proposed sudden change in their protocol,

there is a great risk the outcome will not be humane. The citizens of Oklahoma and, indeed, the Defendants as agents of the State of Oklahoma, have an interest in ensuring the execution protocol does not result in torture or conscious physical suffering. The public's interest in the outcome of this proceeding weighs in favor of granting injunctive relief.

D. Likelihood of Success

28) Evaluation of this factor requires the court to examine the merits of the Plaintiff's claim in light of the limited factual record and the relative positions of the parties. As referenced previously, the Tenth Circuit has adopted a relaxed showing on this prong when the movant has demonstrated the other requirements. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1246-47. Mr. Matthews has shown the other factors to be "tipped" in his favor.

29) Through this litigation, Mr. Matthews is seeking enforcement of his right not to be subjected to cruel and ususal punishment in the form of torture or unnecessary conscious physical suffering, or both, during the course of his execution. This right is guaranteed by the Eighth Amendment and enforceable against the States through the Fourteenth Amendment. Mr. Matthews is also seeking enforcement of his right not to be deprived of life through the arbitrary and capricious actions of persons acting under color of State law. This Constitutional right is guaranteed to Mr. Matthews by the Fifth Amendment and is enforceable against the States through the Fourteenth Amendment. The risk that Mr. Matthews will be denied his Constitutional rights is imminent and substantial. The death of

an inmate through lethal injection procedures that risk torture and unnecessary conscious physical suffering is the quintessence of unconstitutional action by the State resulting in irreparable injury.

III. REQUEST FOR RELIEF

30) All of the considerations applicable to this Motion militate in favor of Mr. Matthews's request. No public purpose will be served by subjecting Mr. Matthews to the clearly identified, verifiable, and substantial risk of unnecessary conscious physical suffering and torture presented by ODOC's execution procedures. There is no remedy at law for the consequences of such a violation of Mr. Matthews's Constitutional rights. Equity favors preserving the *status quo* and allowing this litigation to proceed to a full hearing on the merits. Counsel for Jeffrey D. Matthews respectfully requests this Court enter a preliminary injunction or temporary restraining order precluding the Defendants from proceeding with the execution of Mr. Matthews until this litigation can be resolved.

Respectfully submitted,

s/ Timothy R. Payne

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2010, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic filing to the following ECF registrants: Stephen Krise and Martha Kulmacz, Assistant Attorneys General, counsel for Defendants.

s/ Timothy R. Payne
Timothy R. Payne